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**2004 Wis Eth Bd 08**  
EMPLOYMENT CONFLICTING WITH OFFICIAL DUTIES; LOBBYING  
LAW

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A member of a state board should not participate in the consideration of issues on which the member lobbies on his or her employer's behalf or on matters, which affect those issues. If conflicts arise only occasionally, they may be satisfactorily addressed by abstaining, but when a conflict is regularly occurring and substantial, the conflict's cure can come only from the board member divesting himself or herself of public position or of the private interest that conflicts with public responsibilities.<sup>1</sup>

We also advise that a member of a state board not, on behalf of his or her employer, lobby state government on issues before, or affecting the state board.

Facts

- ¶1 This opinion is based upon these understandings:
- a. Governor Doyle has nominated you for appointment to a state board.
  - b. You are an employee of a registered lobbying principal in Wisconsin.
  - c. The organization employs you as its lobbyist to attempt to influence state legislation and rules.

Question

- ¶2 The Ethics Board understands your question to be:

What, if any, restrictions do laws administered by the Ethics Board place on your serving as a member of the state board while the lobbying organization employs you as its lobbyist?

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<sup>1</sup> 8 Op. Eth. Bd. 33, 41 (1985); 7 Op. Eth. Bd. 21, n. 15 (1983); 7 Op. Eth. Bd. 5, 6 (1983).

## Discussion

### ¶3 *Accepting the appointment to the state board*

Wisconsin's lobbying law, §13.625, *Wisconsin Statutes*, is relevant to your question. Section 13.625, *Wisconsin Statutes*, reduced to its elements, provides:

No lobbying principal  
May furnish  
Money or any other thing of pecuniary value  
To any agency official.<sup>2</sup>

### ¶4 *Agency official*

The first issue is whether a member of the state board is an agency official. The lobbying law defines an "agency official" as "a member, officer, employee,

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<sup>2</sup> Section 13.625 (1) and (2), *Wisconsin Statutes*, provides:

**13.625 Prohibited practices. (1)** No lobbyist may:

(a) Instigate legislative or administrative action for the purpose of obtaining employment in support or opposition thereto.

(b) Furnish to any agency official or legislative employee of the state or to any elective state official or candidate for an elective state office, or to the official's, employee's or candidate's personal campaign committee:

1. Lodging.
2. Transportation.

3. Food, meals, beverages, money or any other thing of pecuniary value, except that a lobbyist may make a campaign contribution to a partisan elective state official or candidate for national, state or local office or to the official's or candidate's personal campaign committee; but a lobbyist may make a contribution to which par. (c) applies only as authorized in par. (c).

(c) Except as permitted in this subsection, make a campaign contribution, as defined in s. 11.01 (6), to a partisan elective state official for the purpose of promoting the official's election to any national, state or local office, or to a candidate for a partisan elective state office to be filled at the general election or a special election, or the official's or candidate's personal campaign committee. A campaign contribution to a partisan elective state official or candidate for partisan elective state office or his or her personal campaign committee may be made in the year of a candidate's election between June 1 and the day of the general election, except that:

1. A campaign contribution to a candidate for legislative office may be made during that period only if the legislature concluded its final floorperiod, and is not in special or extraordinary session.

2. A campaign contribution by a lobbyist to the lobbyist's campaign for partisan elective state office may be made at any time.

(d) Contract to receive or receive compensation dependent in any manner upon the success or failure of any legislative or administrative action.

**(2)** No principal may engage in the practices prohibited under sub. (1) (b) and (c). This subsection does not apply to the furnishing of transportation, lodging, food, meals, beverages or any other thing of pecuniary value which is also made available to the general public.

or consultant of any agency who as part of such person's official responsibilities participates in any administrative action in other than a solely clerical, secretarial or ministerial capacity." §13.62 (3), *Wisconsin Statutes*.

In turn, "administrative action" means "the proposal, drafting, development, consideration, promulgation, amendment, repeal or rejection by any agency of any rule promulgated under ch. 227." §13.62 (1), *Wisconsin Statutes*.

¶5 The board to which you have been nominated has the authority under *Wisconsin Statutes* to promulgate administrative rules. It follows that official responsibilities of the members of the board entail participation in the drafting, development, consideration, promulgation, amendment, repeal, or rejection of rules. Therefore, members of the board are agency officials subject to the lobbying law.

¶6 *§13.625 (6r) exception*

Under §13.625 (6r), *Wisconsin Statutes*, the restriction on an agency official accepting anything of pecuniary value from a principal does not apply to an employee of a principal

Who is an agency official solely because of membership on a state board

If what is furnished does not exceed that which the employer customarily provides to similarly situated employees and

The official receives no compensation for state services other than a per diem or reimbursement of expenses.<sup>3</sup>

¶7 A member of the state board to which you have been nominated may qualify for this exception.<sup>4</sup> The exception applies (1) if you are an employee of the lobbying organization – that is, in an employer-employee relationship –

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<sup>3</sup> §13.625 (6r), *Wisconsin Statutes*, provides:

**13.625 (6r)** Subsections (1) (b) and (c) and (3) do not apply to the furnishing of anything of pecuniary value by a lobbyist or principal to an employee of that lobbyist or principal who is a legislative official or an agency official solely because of membership on a state commission, board, council, committee or similar body if the thing of pecuniary value is not in excess of that customarily provided by the employer to similarly situated employees and if the legislative official or agency official receives no compensation for his or her services other than a per diem or reimbursement for actual and necessary expenses incurred in the performance of his or her duties, nor to the receipt of anything of pecuniary value by that legislative official or agency official under those circumstances.

<sup>4</sup> The statute governing the board provides that its members are eligible to receive reimbursement of expenses and a per diem.

and not an independent contractor<sup>5</sup>; and (2) if your salary and other benefits do not exceed those of the organization's comparably situated employees. Although we understand that you are an employee of organization, we have no information about whether the organization employs anyone in a position comparable to yours or, if it does, the employees' compensation.<sup>6</sup> To demonstrate that you meet this portion of the test, you should be able to show that your salary and benefits, and any raise you receive, are comparable to others with similar seniority, job duties, and status in the company's hierarchy.

### ***Participating in board issues***

¶8 We recognize that board members are part-time officials who have financial interests in various aspects of the economy. Thus, a public official who is a farmer may generally vote on issues affecting agriculture, a lawyer may usually vote on court reform and tort reform, a teacher may reasonably be expected to vote on educational issues; but a farmer generally derives income from farming, a lawyer from providing legal counsel or representation, a teacher from teaching. None is normally paid to promote changes to laws and public policy. Should the farmer, the lawyer, or the teacher take money to try to change the laws and administrative rules of this state and, simultaneously, in a governmental capacity, use his or her office to change those public policies of Wisconsin? No.

¶9 The Ethics Code declares that "ethical standards . . . are essential to the conduct of free government; that the legislature believes that a Code of Ethics for the guidance of state public officials . . . will help them avoid conflicts between their personal interests and their public responsibilities, will improve standards of public service and will promote and strengthen the faith and confidence of the people of this state in their state public officials and state employees."<sup>7</sup>

¶10 By being employed as a paid advocate of legislative and administrative issues while participating in a state board's consideration of those same topics, should they arise, a government official, who owes an undivided duty of loyalty to the public whom he or she serves<sup>8</sup> undermines and weakens citizens' faith and confidence in government. The duty of undivided loyalty

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<sup>5</sup> See 2002 Wis Eth Bd 03; 1999 Wis Eth Bd 04.

<sup>6</sup> This requirement ensures that an employer does not impermissibly reward an employee for serving in a state position.

<sup>7</sup> Section 19.41, *Wisconsin Statutes*.

<sup>8</sup> 1993 Wis Eth Bd 04, ¶5; 1992 Wis Eth Bd 33; 1992 Wis Eth Bd 32; 8 Op. Eth. Bd. 33 (1985); 63A Am. Jur. 2d, Public Officials and Employees §§321, 322.

speaks to an official's abstaining from participating in a matter if a private interest could materially affect the official's judgment or adversely affect the image or effectiveness of Wisconsin's government.<sup>9</sup>

¶11 As one legal treatise has put it:

Public confidence in the performance of government officials is of paramount importance. A public office is a public trust, and the holder thereof may not use it directly or indirectly for a personal profit, or to further his or her own interests, since it is the policy of the law to keep an official so far from temptation as to insure his or her unselfish devotion to the public interest. Officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public. Where a conflict of interest arises, the office holder is disqualified to act in the particular matter and must withdraw.

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In the discharge of his or her duties the officer must be disinterested and impartial, and may not at the same time act in an official capacity and as the agent of one of the public whose interests are adverse to those of another.

*67 Corpus Juris Secundum*, Officers §244, p.477, 479 (footnotes omitted).

¶12 Thus, you should not, as a member of the state board to which you have been nominated, participate in the consideration of issues on which you lobby on your employer's behalf or on matters which affect those issues. We do not know how often, if at all, this may occur. If conflicts arise only occasionally, they may be satisfactorily addressed by abstaining, but when a conflict is regularly occurring and substantial, the conflict's cure can come only from your divesting yourself of your public position or of the private interest that conflicts with your public responsibilities.<sup>10</sup>

We also advise that you not, on behalf of your employer, lobby state government on issues before, or affecting the state board.

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<sup>9</sup> See 2000 Wis Eth Bd 1, ¶14.

<sup>10</sup> 8 Op. Eth. Bd. 33, 41 (1985); 7 Op. Eth. Bd. 21, n. 15 (1983); 7 Op. Eth. Bd. 5, 6 (1983).